ORISSA HIGH COURT
CUTTACK

GOVERNMENT APPEAL NO. 24 OF 1990

From an order dated 02.03.1990 passed by Sri M.N. Patnaik, C.J.M.-cum-Asst. Sessions Judge, Ganjam, Berhampur in S.C. No.1 of 1989.

State of Orissa ..... Appellant

Versus

Basant Kumar Choudhury
and others ..... Respondents

For appellant : Addl. Standing Counsel

For respondents : M/s. S. Das, K.R. Das, S.K. Samantaray & B.K. Kar

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 19.09.2006

PRADIP MOHANTY,J. This appeal is directed against the judgment and order dated 02.03.1990 passed by the learned C.J.M.-cum-Asst. Sessions Judge, Ganjam, Berhampur in S.C. No.1 of 1989 acquitting the respondents of the charge under Sections 366/376(2)(g)/34, IPC.

2. The case of the prosecution is that on 03.03.1988 at about 3 p.m. the victim and one Prafulla, who were co-workers in a Spinning Mill at Khurda, boarded a Berhampur bound bus at Khurda bus stand. They alighted at Berhampur bus stand at 10 p.m. for holidaying at Berhampur during the Holi festival. While they were going from the bus

stand by a rickshaw to the house of Prafulla's sister at Hatibandha Sahi, accused Prakash and Damodar came riding two bicycles and obstructed the rickshaw as they reached a lonely dark place near Radhakrishnan Hostel, dragged Prafulla out of the rickshaw and took him to an unknown destination. An associate of the accused persons sat on the rickshaw and diverted it to a solitary and deserted house beyond Gosaninuagaon at the point of knife. Two of the accused persons namely accused Sivaram and Basant and another man were waiting there. They dragged the victim into the house. Accused Damodar and Prakash joined them. All six of them ravished her inside the house one after the other and after satisfying their lust, the two unknown persons left the place. Thereafter, the four accused persons took the prosecutrix to a nearby tank and there, on a platform, stripped her robes, made her flat and raped her again one after the other. The police arrived while she was being raped by accused Prakash and rounded up the accused persons. The police on the basis of the information lodged by the victim at the spot registered the case and ultimately submitted final form under Sections 366/376/34 IPC.

3. The plea of the accused-respondents was complete denial. Their further plea was that in the night of occurrence while returning from the night show cinema they heard some unnatural sound coming from the ridge of the Agula Bandh tank and went there. Two persons indulging in sex act with the prosecutrix ran away at their sight. The police arrived soon thereafter and rounded them up on suspicion.

4. In order to prove its case, the prosecution examined as many as eight witnesses and proved 13 documents and six material objects in evidence. The accused-respondents examined none in support of their plea.

5. The learned Chief Judicial Magistrate-cum-Asst. Sessions Judge, who tried the case, by his judgment dated 02.03.1990 acquitted the accused persons of the above charges with the finding that

the prosecutrix was a consenting party and had sex with accused Basant alone and police arrived while she was in compromising position with accused Prakash before beginning of the sex act.

6. Mr. Mohanty, learned Addl. Standing Counsel, submits that there are ample materials against the accused-respondents. There was no reason for the trial court to disbelieve the evidence of P.W.1 and come to the conclusion that the prosecutrix was a consenting party to the sexual intercourse. Moreover, P.Ws.4, 5 and 8, the police officials, found the prosecutrix and the accused persons totally nude near the platform of the 'choura'. All the accused persons were caught red handed at the spot. Further, P.W.6, the Professor of F.M.T. Department, M.K.C.G., Medical College, Berhampur, who examined the prosecutrix, found two contusions on the left breast of the prosecutrix.

7. Mr. Das, learned counsel appearing for the accused-respondents, on the other hand, submitted that the impugned judgment of acquittal is based on sound reasonings and there is no scope for interference by this Court. He further submitted that the story as narrated by the prosecutrix that she was subjected to forcible intercourse for ten times is far from belief.

8. Perused the LCR including the impugned judgment, statements of the witnesses as well as the medical report. Admittedly, the prosecutrix was about 17 years of age at the time of occurrence which has also been confirmed by the medical evidence. She was medically examined by Professor F.M.T. (P.W.6) on the next morning. P.W.6 found old tears in the hymen and vaginal orifice was roomy enough to admit 2.1/2 fingers without difficulty. There was no bleeding and injury on her private part, excepting two minor contusions on the left breast, which were probably caused by pressure of fingers. There was no injury on any other part of her body. P.W.6 also examined the accused persons in

between 10.45 a.m. to 11.15 a.m. and found no sign of recent sexual intercourse in them except in the person of accused Basant. There was no injury to the private parts of any of the accused persons nor had they sustained injury on any other part of their body. The credibility of the prosecutrix's version that she was raped by six persons (including the accused-respondents) in the house is not believable since P.W.6 the doctor does not corroborate the same. Had she been raped by six persons, she would not have been able to walk up to the ridge of the tank and in ordinary course would have fainted after being subjected to forcible intercourse by six persons. That apart, the P.W.1 also differs from her FIR version in court. P.W.4, the police officer, has admitted that no cry or alarm was raised by the prosecutrix. On the contrary, the evidence of P.Ws.4, 5 and 8, the police officers, is that the prosecutrix got up herself and accompanied them to the police station. Had she been raped ten times in succession, as deposed by her, she would not have ordinarily been able to get up and walk without difficulty. The presumption under Section 114A of the Indian Evidence Act is not attracted as the prosecutrix had sex with only one person with consent. Being caught red handed in a compromising position with accused Prakash, the prosecutrix alleged that she was ravished without her consent as she would not ordinarily admit that it was with her consent on account of modesty.

9. For the foregoing reasons, this Court is of the opinion that the trial court has rightly passed an order of acquittal and there is no scope to interfere with the same. The Government Appeal is devoid of any merit and is dismissed as such.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
The 19th September, 2006/***Samal***